

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MARSHALL KIRKPATRICK,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

) Case No. SUSP-97-0035

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on January 6, 2000.

1.2 **Appearances.** Appellant Marshall Kirkpatrick was present and was represented by Mark A. Anderson, In-House Counsel for Teamsters Local 313. Respondent Department of Corrections was represented by Robert W. Kosin, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a suspension for neglect of duty and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleges that Appellant shoved a coworker.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Skaalheim v.

1 Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans
2 Affairs, PAB No. D91-084 (1992).

3 4 **II. FINDINGS OF FACT**

5 2.1 Appellant Marshall Kirkpatrick is a Correctional Officer 2 and permanent employee for
6 Respondent Department of Corrections at the McNeil Island Corrections Center. Appellant and
7 Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder,
8 Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on
9 October 13, 1997.

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11 2.2 By letter dated August 22, 1997, Belinda D. Stewart, Superintendent, informed Appellant of
12 his suspension effective September 14, 1997 through September 20, 1997. Superintendent Stewart
13 charged Appellant with neglect of duty and willful violation of published employing agency rules
14 and regulations for allegedly shoving a coworker.

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16 2.3 Appellant has been employed with the Department of Corrections for approximately six
17 years. Appellant received prior discipline for sleeping while on duty. Appellant admits that he lied
18 during the investigation into the incident that led to his prior discipline.

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20 2.4 On the morning of May 20, 1997, Appellant was finishing his shift and Correctional Officer
21 Jack Knight was relieving him. Officer Knight had been dissatisfied with the cleanliness of the unit
22 and addressed the issue with Appellant. Appellant disagreed with Officer Knight's complaint that
23 the unit was in disarray. Appellant and Officer Knight continued their discussion and they
24 subsequently began to argue loudly. Appellant and Officer Knight approached their supervisor,
25 Sergeant Johnny Rich, to discuss the issue. However, Sergeant Rich was conducting a hearing with
26 an inmate and was unable to meet with them.

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2 2.5 Appellant refused to continue the discussion and proceeded to leave the unit. Officer Knight
3 followed Appellant and walked approximately two to three steps behind him. As he followed
4 Appellant, Officer Knight continued to complain that the unit was a mess. Appellant continued to
5 deny that the unit was in disarray and told Officer Knight that he did not wish to continue the
6 discussion.

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8 2.6 Appellant and Officer Knight presented conflicting testimony on what occurred next.
9 Officer Knight testified that when they reached the end of the sidewalk, Appellant suddenly
10 stopped, dropped the bag he was carrying, turned around, and shoved him using both hands.
11 Officer Knight testified that he held up his hands in a defensive manner and told Appellant to stop.

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13 2.7 Appellant testified that Officer Knight was behaving in a threatening manner. Appellant
14 testified that Officer Knight told him to take his “ass home” and that he began to fear for his safety
15 so he stopped and turned around. Appellant asserts that Officer Knight sped up and rammed him in
16 the chest, knocking him backward. Appellant states that when he regained his balance, he put his
17 hands up in a defensive manner to prevent Officer Knight from assaulting him.

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19 2.8 We find Officer Knight credible. In making our determination of credibility, we have
20 considered the following testimony presented by three other independent witnesses. Based on the
21 corroborating testimony of the witnesses, we find that Appellant’s version of the incident is not
22 believable.

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24 2.9 Correctional Officer Charles L. Wade was present in the unit when the initial argument
25 between Appellant and Officer Knight ensued. He observed the officers as they walked away from
26 the unit and could hear their raised voices. Both officers appeared angry. Officer Wade observed

1 Appellant and Officer Knight walk down the sidewalk when Appellant suddenly stopped, dropped
2 his bag, turned around and used both hands to push Officer Knight away.

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4 2.10 Correctional Unit Supervisor (CUS) John Upchurch observed Appellant and Officer Knight
5 as they walked down the sidewalk away from the unit. From his office in the unit, Mr. Upchurch
6 could not hear the conversation, however, he observed Appellant stop, turn toward Mr. Knight and
7 make a shoving movement. Officer Knight stepped back and held his hands up in a defensive
8 manner. CUS Upchurch did not observe Officer Knight strike back at Appellant.

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10 2.11 Correctional Officer John Lowrance also observed Appellant drop his bag, turn around to
11 face Officer Knight and use both his hands to push Officer Knight in the shoulder/chest area.

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13 2.12 Respondent has adopted policies which require employees to maintain high professional and
14 ethical standards and to treat staff with dignity and respect. On June 27, 1994, Appellant
15 acknowledged his awareness of the institution's policies and practices. In addition, Respondent
16 provided Appellant with training in conflict resolution and interpersonal communication.

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18 2.13 Belinda D. Stewart is currently the Superintendent of the Washington Corrections Center for
19 Women. However, she was the Superintendent and the appointing authority at the McNeil Island
20 Corrections Center when the suspension was imposed against Appellant. In determining whether
21 misconduct occurred, Ms. Stewart reviewed the investigative report, reviewed Appellant's
22 personnel file, including his previous discipline, and she held an administrative hearing with
23 Appellant. In determining what occurred between Appellant and Officer Knight, Ms. Stewart made
24 a determination of credibility in which she weighed the description of the events presented by
25 Appellant, Officer Knight and other witnesses present. In finding Appellant's version of the events
26 not to be credible, Ms. Stewart took into consideration a previous incident in which Appellant was

1 untruthful during the investigation into the charge that he was sleeping while on duty. Ms. Stewart
2 ultimately concluded that verbal confrontation between Appellant and Officer Knight escalated into
3 a physical altercation when Appellant turned around and shoved Officer Knight.

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5 2.14 In determining what level of discipline to impose on Appellant, Ms. Stewart considered
6 Appellant's responsibilities as a correctional officer: to maintain the security of the institution and
7 to model appropriate and acceptable behavior. Ms. Stewart concluded that Appellant neglected his
8 duty to act in a professional manner and failed to diffuse the confrontation with Officer Knight,
9 which occurred in a very visible area of the institution grounds. Ms. Stewart did not believe that
10 Officer Knight's unprofessional demeanor and antagonistic behavior mitigated Appellant's
11 response and she concluded that a one-week suspension was the appropriate sanction.

12 13 **III. ARGUMENTS OF THE PARTIES**

14 3.1 Respondent argues that testimony from numerous witnesses supports Officer Knight's
15 contention that Appellant shoved him. Respondent recognizes that Officer Knight, in his attempt to
16 resolve the issue, may have "needled" Appellant. However, Respondent asserts that it was
17 Appellant who became angry and assaulted Officer Knight. Respondent argues that Appellant is
18 not credible based on his history of not telling the truth and that his version of the incident is not
19 believable. Respondent asserts that correctional officers work in a highly structured and stressful
20 environment and are expected to model appropriate and professional behavior. Respondent argues
21 that violence in the workplace cannot be tolerated and that the sanction imposed on Appellant is not
22 too severe.

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24 3.2 Appellant argues that when Officer Knight reported for duty, he took issue with the
25 cleanliness of the unit and became argumentative. Appellant asserts that they tried to resolve the
26 issue, but were unable to reach a resolution. Appellant argues that when he attempted to leave the

1 unit, Officer Knight proceeded to follow and harass him. Appellant asserts that Officer Knight
2 became hostile and aggressive and became more argumentative. Appellant contends that Officer
3 Knight was speaking in an aggressive tone of voice and that he berated and threatened him.
4 Appellant contends that he felt belittled and intimidated when Officer Knight told him to take his
5 “ass home” and he turned around to protect his personal safety. Appellant asserts that Officer
6 Knight assaulted him and when he regained his composure he raised both his hands, in a defensive
7 gesture, to keep Officer Knight away. Appellant argues that he used reasonable force to defend
8 himself and was justified in raising his hands when Officer Knight moved toward him. Appellant
9 asks that the suspension be reversed.

11 IV. CONCLUSIONS OF LAW

12 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
13 herein.

15 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
16 the charges upon which the action was initiated by proving by a preponderance of the credible
17 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
18 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep’t of
19 Corrections, PAB No. D82-084 (1983).

21 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
22 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep’t
23 of Social & Health Services, PAB No. D86-119 (1987).

25 4.4 Willful violation of published employing agency or institution or Personnel Resources
26 Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

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4 4.5 In determining whether a sanction imposed is appropriate, consideration must be given to
5 the facts and circumstances, including the seriousness and circumstances of the offenses. The
6 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
7 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
8 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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11 4.6 Respondent has met its burden of proof that Appellant shoved Officer Knight and that his
12 behavior constituted a neglect of his duty and a willful violation of agency policy. Appellant has
13 been employed by the department for over six years and understood what was expected of him as a
14 correctional officer. His behavior was inappropriate and unprofessional and he must be held
15 accountable. Appellant had a history of being untruthful during a previous investigation in which
16 he was disciplined for sleeping while on duty. In this case, sufficient and credible evidence
17 established that although Officer Knight was antagonizing him, it was Appellant that ultimately
18 shoved Officer Knight. Appellant's conduct is not mitigated by Officer Knight's unprofessional
19 and improper behavior during the incident.
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22 4.7 In assessing the level of discipline, we conclude that the sanction imposed by the
23 Superintendent was sufficient to prevent recurrence, to deter others from similar misconduct and to
24 maintain the integrity of the program. Therefore, the appeal should be denied
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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Marshall Kirkpatrick is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Walter T. Hubbard, Chair

Gerald L. Morgen, Vice Chair